79-883

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

BERTRAM ZWEIBON, *et al.*,

Petitioners,

v.

JOHN N. MITCHELL,

Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINION BELOW

The opinion of the court of appeals, reproduced in the appendix to the government's petition in this case, is not yet reported. The opinion of the district court is reported at 444 F. Supp. 1296.

JURISDICTION

The opinion of the court of appeals was filed on July 12, 1979. On October 2, 1979, Mr. Chief Justice Burger extended petitioners' time for filing a petition for a writ

of certiorari to and including December 9, 1979 (App. A, p. 1a, *infra*). Ths jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the civil damage remedy granted by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2520, may apply to warrantless "national security" wiretaps conducted after the law was enacted but before this Court's decision in *United States v. United States District Court*, 407 U.S. 297 (1972), and before the decision of the court of appeals in *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975).

2. Whether plaintiffs who have successfully litigated an unprecedented theory of civil liability may be denied the benefits of that new theory on the ground that the new ruling is not to apply retroactively.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §2520 provides:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person –
>
> (a) actual damages but not less than liquated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
>
> (b) punitive damages; and
>
> (c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

STATEMENT

Petitioners are individuals who were members of, or associated with, the Jewish Defense League ("JDL"). In October 1970 and between January and July 1971, the respondent, while he was Attorney General, directed the installation and operation of a warrantless wiretap on a number of telephones in the New York offices of the JDL. Petitioners were allegedly overheard during these wiretaps. Petitioners instituted this action in 1971, alleging that the wiretaps violated the Fourth Amendment as well as Title III of the 1968 Omnibus Crime Control and Safe Streets Act. The defendants[1] moved for summary judgment on the ground that the wiretaps were "national security" surveillances which could lawfully be installed without a judicial warrant. The district court granted the motion *(Zweibon v. Mitchell*, 363 F. Supp. 939 (D.D.C. 1973)). In a lengthy opinion, a majority of the court of appeals, which sat *en banc*, reversed *(Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975)). Petitioners sought a writ of certiorari from this Court to review the "good faith" defense which the court of appeals permitted under its decision, but the petition was denied. *Zweibon v. Mitchell*, 425 U.S. 944 (1976).

On remand, the district court again granted summary judgment for the defendant, this time on the ground that the conclusion that "national security" wiretaps required a warrant should not be applied to civil damage suits

[1] The original complaint named the FBI agents who listened to the conversations as defendants along with the former Attorney General. The FBI agents have since been dropped as defendants, and they are no longer parties to this action.

growing out of wiretaps installed and operated before this Court's decision in *United States v. United States District Court*, 407 U.S. 297 (1972), and before the court of appeals' 1975 decision in this litigation. *Zweibon v. Mitchell*, 444 F.Supp. 1296 (D.D.C. 1978).[2]

The court of appeals again reversed. It held that the constitutional claim under the Fourth Amendment could be retroactively applied because the 1972 decision of this Court and the court of appeals' 1975 decision "did not announce a new principle of law, but simply applied the constitutional warrant requirement to national security situations." With regard to petitioner's claim under the 1968 Act, however, the court of appeals denied retroactive effect to its 1975 ruling on the ground that the statutory question was "one of first impression, and was quite complex, involving sophisticated analysis of *Keith* and of the legislative record."

REASONS FOR GRANTING THE WRIT

1. If this Court grants respondent's petition, pressed on his behalf by the Solicitor General, to review the decision of the court below giving retroactive effect to the Fourth Amendment ruling in the 1975 *Zweibon v. Mitchell* decision, it should also grant this petition to review the *denial* of retroactive effect to the statutory aspect of the 1975 decision. The questions of statutory construction relating to Title III of the 1968 Act turned on very similar considerations to those which resulted in the constitutional ruling. Congress was aware of the direction of this Court's decisions in the 1960's, and it adopted the 1968 Act in light of constitutional standards. Hence

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[2]After the initial remand, the district court also struck petitioners' demand for a jury trial. The court of appeals reversed that ruling on petitioners' request for issuance of a writ of mandamus. *In re Zweibon*, 565 F.2d 742 (D.C. Cir. 1977).

neither the judicial construction of the Fourth Amendment nor the judicial construction of the statute presented the sharp breaks with past precedent which justify limiting the 1975 decision to prospective effect.

Moreover, contrary to the suggestion of the court below that the availability of the constitutional remedy affords sufficient opportunity for redress to the petitioners, there are real and substantial detriments that flow from the decision below. *First*, the liquidated damages remedy provided by 18 U.S.C. §2520 is an important element in any possible lawsuit, and the effect of the decision below is to leave its applicability to this case in serious doubt. *Second*, the refusal to apply the "procedural requirements" of Title III to a wiretap which was conducted more than two years after the law was enacted simply because no court had yet ruled on its application to these facts substantially diminishes the protection afforded by the 1968 Act and the availability of a meaningful remedy for the petitioners. The "procedural requirements" of Title III should have been followed if the Attorney General decided to tap the JDL phones, and petitioners should be entitled to recover such damages as were authorized by the 1968 Act for any failure to follow these requirements.

2. The refusal of the court below to grant to the petitioners the benefit of the ruling which they arduously sought and won in the landmark case they instituted conflicts with the approach to prospectivity taken by this Court in its prospectivity rulings. See, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *United States v. Wade*, 388 U.S. 218 (1967). Even though each of these new rulings was ultimately declared non-retroactive, this Court did not apply the prospectivity principle to the prevailing party in the very case which established the new rule. Obviously, to deprive a prevailing party in such a case of the benefit of

the legal rule he sought and secured would have the effect of removing the principal incentive to bring and maintain civil actions in which unprecedented theories of liability are asserted.

CONCLUSION

For the foregoing reasons, this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1979

APPENDIX

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. A-272

Betram Zweibon, *et al.*,

Petitioners,

v.

John N. Mitchell

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 9, 1979

/s/ Warren E. Burger

Chief Justice of the United States.

Dated this 2nd
day of October, 1979